BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT G. ROGERS	)	
Claimant	)	
V.	)	Docket No. 1,053,980[1]
	)	
ALT-A&M JV LLC[2]	)	
Respondent	)	

ORDER

Respondent requested review of Administrative Law Judge Brad E. Avery's May 6, 2014 Award. The Board heard oral argument on November 19, 2014.

APPEARANCES

William L. Phalen, of Pittsburg, appeared for claimant. Patrick C. Smith, of Pittsburg, appeared for respondent. Board Member Thomas Arnhold recused himself from this appeal due to a conflict. Wade A. Dorothy, of Overland Park, was appointed as Board Member Pro Tem in this case.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, respondent stated it would concede claimant made written claim if the evidence shows written claim was satisfied.

ISSUES

The judge ruled claimant suffered personal injury to his left knee in a September 15, 2008 accident which arose out of and in the course of his employment. The judge concluded claimant provided timely written claim. Claimant was awarded permanent partial disability benefits based on a 7.5% functional impairment to his left lower extremity.

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[1] The record contains many references to Docket No. 1,048,123. Such docketed case was for the same accident, but filed against a separate entity – A&M Engineering – because of some confusion as to the correct employer. It was not heard and the regular hearing in such other case was continued, pending the outcome of this case, Docket No. 1,053,980. The employer and employee relationship was admitted by ALT-A&M JV LLC. (ALJ Award at 1). All references in this decision to "respondent" refer to ALT-A&M JV LLC.

[2] The Award and the parties' briefs reference respondent as a self-insured, but it appears from the record that respondent was uninsured at the time of claimant's accident. [See respondent's "Response to Written Notice to Commissioner" (filed Jan. 19, 2011), which states in paragraph 2 that respondent "was unaware that it did not have coverage at the time of Claimant's claim herein."].

Respondent requests the Award be reversed. Respondent asserts claimant gave materially inaccurate, false and incomplete information regarding a February 8, 1999 left knee injury both when testifying and in providing his medical history to physicians. Respondent contends claimant's misrepresentations about his prior left knee injury establish he did not prove either: (1) personal injury by accident arising out of and in the course of his employment or (2) any permanent impairment due to his alleged 2008 left knee injury. Respondent also contends claimant failed to satisfy written claim. Given respondent's conditional concession of this issue, the Board will still address it. Finally, respondent argues the judge should have granted its motion for an extension of time to present additional medical evidence. Claimant maintains the Award should be affirmed.

The issues for the Board's review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment?

2. Was written claim satisfied?

3. What is the nature and extent of claimant's disability?

4. Should the judge have granted respondent's Motion for Extension of Time?

FINDINGS OF FACT

Respondent is a limited liability company organized under Oklahoma law. Respondent is also a joint venture between ALT Environmental Services, LLC, and A&M Engineering and Environmental Services, Inc. (A&M Engineering). Respondent and A&M Engineering have the same Tulsa, Oklahoma address, as well as the same phone number.

Respondent's defenses, at least in part, are based on the theory claimant is not credible because he repeatedly denied having a prior left knee injury. As such, the Board will first provide facts regarding a left knee injury claimant sustained over nine and one-half years before the left knee injury involved in the present case. We will then address the September 15, 2008 injury.

On February 8, 1999, claimant slipped on ice and injured his left knee while working for International Technology Corporation. He obtained treatment with Paul L. Toma, D.O., who had claimant undergo physical therapy. Claimant had a left knee MRI on February 18, 1999, which showed a "pretty minor change"[3] to his left knee. Claimant attended eight of 10 physical therapy sessions through March 16, 2009. Claimant did not have any knee injections and he was not a surgical candidate. Dr. Toma's June 3, 1999 rating report stated:

[3] Toma Depo. at 11.

> Mr. Rogers had suffered an injury to his left knee on or around 2/8/99. He was subsequently seen in my office on 2/15/99. Initially the patient was unable to walk and had significant loss of motion but over time with rehabilitation, physical therapist [sic] and following an MRI which showed no significant injury other than a possible degeneration of the posterior horn of the medial meniscus the patient has made a fairly good recovery. He still has some weakness in the hamstrings and quadricep muscles. However, I feel that these can be improved with continued exercise at home.
>
> At this time the patient has suffered a 5% impairment of the left knee or lower extremity which has occurred at the 160-week level of the lower extremity.[4]

Dr. Toma never examined claimant after February 15, 1999. Claimant settled his 1999 left knee injury on September 7, 1999. The settlement hearing transcript shows claimant was paid $2,393.75 in temporary total disability benefits, presumably at two-thirds (0.6667) of his $628.31 average weekly wage at the time, which would result in claimant having been off work for 5.71 weeks.[5] Claimant settled the 1999 injury for $3,257.29, purportedly based on the value of a 5% impairment of function to his left lower extremity at the level of the knee.

Returning to the present case, claimant filled out a job application to work for respondent and signed an employment agreement with respondent on June 23, 2008. Claimant also underwent a pre-employment physical, which he testified revealed no left knee problems.

On September 15, 2008, claimant slipped and fell down a wet slope while carrying a five-gallon bucket of hydraulic fluid while working for respondent. He injured his left knee. That same day, he reported the incident to the project manager, Gary Oplotnik, and the general manager, Don Hart. Claimant filled out an "Incident/Accident Investigation Report Form" because, according to his testimony, he wanted "[t]o get workmen's comp."[6]

That same day, Mr. Oplotnik filled out an "Incident/Accident Investigation Report Form" in which he questioned the validity of the accident because claimant was not limping when he reported the injury. Nonetheless, Mr. Oplotnik authorized medical treatment in a form titled "Employer Authorization for Medical Treatment" that he signed and dated September 15, 2008.

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[4] *Id*., Cl. Ex. 1 at 3.

[5] Division records state claimant was paid 6.51 weeks of TTD at the rate of $366. How these figures were computed is unknown. [See Claimant's Depo. (Jan. 31, 2014), Resp. Ex. I at 2]. The Settlement Hearing transcript also shows claimant was overpaid $300.23 in TTD benefits. Records from the insurance carrier for the 1999 claim state claimant was paid 5.72 weeks of TTD. (See Richeson Depo., Ex. 1 at 8).

[6] R.H. Trans. at 11.

Respondent referred claimant to a clinic where Darcy Selenke, M.D., diagnosed him with a left knee strain and took him off work for two days. Dr. Selenke ordered a left knee MRI, which was performed on September 26, 2008. Such study was interpreted as showing a tibia bone bruise, soft tissue edema, small knee joint effusion, a tiny ganglion cyst, degenerative intrameniscal signal and no meniscal tears.[7]

Claimant was referred to Jonathan Grantham, M.D., an orthopedic surgeon, who evaluated claimant on October 7, 2008. The doctor ordered physical therapy. On October 28, 2008, Dr. Grantham noted claimant might need arthroscopic surgery.

Respondent sent claimant to James C. Slater, M.D., for a second opinion on December 19, 2008. Claimant told Dr. Slater he had a prior left knee injury in the remote past. Dr. Slater diagnosed claimant with a left knee sprain/strain, bone contusion or bruise, possible chondral injury and tendinitis. Dr. Slater did not believe knee surgery would be beneficial. He recommended medication, rest and weight loss. Dr. Slater noted the major cause of claimant's condition and symptoms was the September 15, 2008 work injury.

Dr. Grantham operated on claimant's left knee, performing an arthroscopy with plica resection on February 20, 2009. Claimant had additional physical therapy.

Respondent mailed an "Employer's Report of Accident" to the Kansas Division of Workers Compensation with a letter dated March 4, 2009. The letter stated claimant, as a result of his surgery, was "now receiving compensation pay from the company."[8]

Respondent also reported claimant's injury to CompSource Oklahoma, its workers compensation carrier. In such report, respondent answered "No" to the question, "Is the validity of the accident/injury in doubt?"[9] It appears CompSource Oklahoma denied coverage for claimant's injury, as it only provided coverage for employees hired in Oklahoma and it contended claimant was hired in Kansas.[10]

In a March 12, 2009 letter, Dr. Slater, after reviewing Dr. Grantham's operative report, concluded, "The plica is not the cause of his current symptoms, nor a result of the injury sustained on the job. The findings and the procedure are not directed to a work-related injury, but instead mild chronic ongoing deterioration unrelated to the previously documented injury."[11]

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[7] These medical records, along with various other medical records, including records from Drs. Grantham and Slater, are in David Cooper's deposition exhibits which were verbally stipulated into evidence at the August 26, 2011 Regular Hearing.

[8] Cooper Depo., Ex. 11-C.

[9] *Id.*, Ex. 11-D at 2.

[10] The Board makes no comment as to this potential coverage question.

[11] Cooper Depo., Ex. 9 at 6.

Dr. Grantham released claimant from treatment at maximum medical improvement without work restrictions on May 14, 2009.

Respondent sent several letters to claimant's medical providers[12] between March and June 2009. In such letters, respondent referred to claimant's workers compensation claim. Respondent paid for claimant's medical treatment, including payment for claimant's surgery by way of a July 14, 2009 check.

Claimant sent a "Written Claim for Workers Compensation" form (K-WC 15) with a November 2, 2009 letter to A&M Engineering. Such written claim form alleged an injury that occurred on or about September 2008. Claimant also filed an Application for Hearing, as against A&M Engineering, on November 3, 2009.[13] Such document alleged a series of accidental injuries beginning September 1, 2008. On November 4, 2009, Brenda Hughes, who possibly worked for A&M Engineering or respondent, signed a receipt for the written claim form, which had been sent by registered mail.

Also on November 4, 2009, the Division of Workers Compensation mailed a document titled "Notice of Hearing Application for Hearing" to respondent. Such notice concerned Docket No. 1,048,123 and indicated claimant had a claim against respondent. Such document is part of the Division's records.

The attorney for respondent filed an entry of appearance in Docket No. 1,048,123 by way of a November 24, 2009 letter to claimant's counsel. Such entry of appearance identified the respondent as ALT-A&M JV LLC.

On December 4, 2009, claimant was evaluated at his attorney's request by Edward Prostic, M.D., a board certified orthopedic surgeon. Dr. Prostic took a history and stated:

> [Claimant] was carrying a 5-gallon container down an embankment when he lost his footing and had his left knee fold behind him. He had progressive swelling that day and left work early. He was seen by a physician in Columbus, Kansas, who took x-rays and gave an Ace wrap. For worsening of swelling, he was sent to St. John's Regional Medical Center where an MRI and x-rays were performed. He was noted to have a knee effusion. He was subsequently transferred to the care of Dr. John Grantham of Joplin, Missouri. Conservative care was given. Second opinion was provided by Dr. James Slater of Tulsa, Oklahoma. The patient was operated by Dr. Grantham for release of a plica at St. John's Hospital, February 20, 2009. Partial relief occurred. The patient did not return to his original employer. He is now working as a senior operator for a different company.[14]

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[12] Such medical providers include St. John Medical Center Work Partners, Columbus Rural Health Clinic, Physical Therapy of Joplin, St. John Maude Norton Memorial Hospital, Orthopaedic Specialists of Four States, Jonathan L. Grantham, M.D. and St. John Regional Medical Center.

[13] This case became Docket No. 1,048,123.

[14] Prostic Depo., Ex. 1 at 1.

Dr. Prostic diagnosed claimant with left knee plica and grade II chondromalacia of medial femoral condyle and status post arthroscopic left knee plica resection. Dr. Prostic recommended claimant lose weight, perform strengthening and stretching exercises, regularly use anti-inflammatory medication and minimize climbing, squatting and kneeling.

The Division's file in Docket No. 1,048,123 contains documents dated December 14, 2009, and January 6, 2010, showing claimant filed applications for preliminary hearing. Such documents were emailed to David Cooper, respondent's health and safety officer. Such documents list respondent as the party against whom claim was being pursued.

On March 24, 2010, Dr. Prostic assigned a 10% permanent partial impairment to claimant's left lower extremity pursuant to the AMA *Guides*[15] (hereafter *Guides*) for the partial synovectomy and recurrent subluxation of his patella.

Claimant initially testified on May 10, 2010. He denied any prior left knee injury or difficulties, such as time off work due to any prior workers compensation injuries, apart from a claim involving his back. Claimant testified while his employment application listed ALT-A&M JV LLC as the employer, he always knew the company as A&M Engineering and everybody referred to the company as A&M Engineering.

On September 29, 2010, claimant was evaluated by Peter Bieri, M.D., for a court ordered independent medical evaluation.[16] According to Dr. Bieri's report, claimant specifically denied any preexisting illness or injury involving the left knee. Claimant stated while surgery was helpful, he continued to experience pain and increased difficulty with prolonged weight bearing and ambulation, as well as climbing and descending steps and ladders. There was no specific complaint of instability. Dr. Bieri noted slight to moderate tenderness along the medial joint line to the patellofemoral joint, no instability, no persistent loss of sensation, no significant atrophy, no swelling or effusion and strength testing was normal. On account of the September 15, 2008 left knee injury, Dr. Bieri assigned a 5% impairment to the left lower extremity pursuant to the *Guides*.

Mr. Cooper testified on November 3, 2010. Mr. Cooper denied A&M Engineering was ever held out as being part of respondent or the joint venture and testified they are "[t]wo entirely separate entities."[17]

Claimant testified a second time on August 26, 2011. He reiterated that he had no prior left knee complaints, treatment or workers compensation claims. He also denied having left knee problems immediately before his 2008 accidental injury.

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[15] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides*.

[16] The only order in the administrative file is actually contained in the file for Docket No. 1,048,123. However, the judge and both parties appear to treat the IME as pertaining to Docket No. 1,053,980.

[17] Cooper Depo. at 65.

Dr. Prostic's October 4, 2011 testimony is consistent with his December 4, 2009 report and March 24, 2010 rating report. Dr. Prostic testified claimant made no mention of any prior left knee injury and acknowledged his opinions could change if claimant was not truthful during the examination. Dr. Prostic indicated claimant's predominant problem was the instability of the patella and "the tilting of the patella more likely than not preceded the accident."[18] Dr. Prostic opined claimant's height and weight predisposed him to knee problems. Dr. Prostic testified claimant's 2008 accidental injury at least resulted in a permanent worsening of any preexisting permanent left knee problems, assuming such preexisting problems existed.

The judge suspended terminal dates on November 2, 2011.

On January 15, 2013, claimant returned to Dr. Bieri, apparently pursuant to court Order.[19] Dr. Bieri was asked to review certain additional medical records and the 1999 settlement hearing transcript. The history claimant provided to Dr. Bieri regarding his 1999 injury was:

> The claimant relates that while working as a heavy equipment operator at Compass Environment, he fell on the ice while getting into a front loader spraining his left knee. He missed work for a couple of days, but was not placed on any restrictions and had no physical therapy or other treatment for the knee injury. He was awarded a settlement at the hearing with the Division of Workers Compensation on September 7, 1999. An impairment was allocated by Paul Toma D.O., orthopedist, as 5% left lower extremity on June 3, 1999. The claimant indicates that he had forgotten to report this pre-existing problem on his Independent Medical Evaluation of September 29, 2010.[20]

Dr. Bieri also noted the claimant denied problems with his extremities in an October 25, 2010 pre-employment physical for an unrelated employer, as well as no difficulty bending his knees, squatting, climbing stairs or a ladder, carrying more than 25 pounds, or stiffness or pain in his joints when performing repetitive motions. However, Dr. Bieri stated claimant reported his 2008 knee injury and resulting surgery to such potential employer. Dr. Bieri revised his prior 5% rating to the left lower extremity and opined claimant suffered a 3% permanent partial impairment to the left lower extremity "which is independent and separate from the pre-existent impairment."[21]

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[18] Prostic Depo. (Oct. 4, 2011) at 28.

[19] The administrative file contains no such order, but Dr. Bieri states a court order requested that he review additional documentation and provide his opinions. Dr. Bieri's report only mentions Docket No. 1,048,123.

[20] Bieri Report (Jan. 15, 2013) at 2.

[21] *Id*. at 4.

On April 29, 2013, claimant was reevaluated by Dr. Prostic. Claimant complained of intermittent ache which worsened with progressive standing, walking, stairs, squatting or kneeling. He reported occasional swelling and popping, but no locking or giving way and some sensitivity to weather. X-rays revealed neutral alignment with mild medial space narrowing and no obvious osteophytes. Dr. Prostic concluded claimant's permanent partial impairment remained at 10% to the lower extremity.

Dr. Prostic testified again on May 17, 2013. Dr. Prostic opined claimant was starting to undergo arthritic changes in his knee which he testified was the natural flow and progression of his work-related injury. Dr. Prostic testified claimant had healed completely from his 1999 injury and testified the 10% impairment was over and above any preexisting impairment. Dr. Prostic also testified that the alternative bases for his rating – either plica resection and patellofemoral dysfunction or neutral alignment on x-ray – were not noted in Dr. Toma's 1999 report, which concerned hamstring and quadriceps weakness.[22] Dr. Prostic characterized Dr. Toma's 1999 report as showing an essentially normal left knee.

The judge reinstated terminal dates on August 30, 2013.

Claimant testified a third time on January 31, 2014. When presented with documentation about his 1999 settlement concerning a prior left knee claim, he testified he had forgotten the prior injury. He testified he did not consider his prior left knee problem – which he classified as a sprain – as a prior injury. Claimant generally denied remembering having prior physical therapy or receiving temporary total disability benefits for perhaps around six weeks. Claimant testified he made a full and complete recovery, without any need for restrictions, prescriptions or medical treatment between 1999 and his 2008 accident. He further testified he was able to continue working his same duties without any problems until his injury in 2008. Claimant denied lost left knee range of motion or left leg muscle deficit before going to work for respondent.

Paul Toma, D.O., a board certified orthopedic surgeon, testified on February 18, 2014. Dr. Toma was the treating physician for claimant's 1999 injury. Due to the length of time since he last treated claimant, Dr. Toma was unable to locate a file, which likely was purged. The only record available was his June 3, 1999 rating report, which is noted above as showing a 5% impairment rating to the left lower extremity.

Dr. Toma testified he would always rate Kansas cases using the *Guides,* but indicated he normally used the Missouri week level. Dr. Toma indicated the reference to the week level did not change his opinion that his rating was based on the *Guides*. While he could not say for certain that he utilized the *Guides*, he testified it was his general practice to use the *Guides* when assigning an impairment rating because it works in both Kansas and Missouri.

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[22] Prostic Depo. (May 17, 2013) at 20-21, 32-33.

Dr. Toma opined his rating was based either on claimant's possible degenerative posterior horn of the medial meniscus or decreased range of motion. Absent his chart, the doctor was unable to say exactly what his rating was based upon. Dr. Toma testified that he sometimes will not state whether a patient has pain. He stated claimant likely had normal knee range of motion. He did not indicate claimant had an abnormal gait when he last evaluated claimant. Dr. Toma did not know if claimant's muscle weakness persisted after February 15, 1999.

A motion hearing was held on March 28, 2014 relative to respondent's request for an extension of terminal dates. Following reinstatement on August 30, 2013, respondent filed four separate motions to extend terminal dates on October 28, 2013, December 2, 2013, February 6, 2014 and March 10, 2014. The judge's April 2, 2014 Order stated, in pertinent part:

> The Court finds the respondent has had an ample opportunity to depose Dr. Slater. The regular hearing was held on August 26, 2011. Claimant requested the initial extension of terminal dates to "address average weekly wage issues and additional evidence from the independent medical examination." Terminal dates were suspended on November 2, 2011 to allow Dr. Bieri to review additional records and draft a supplemental independent medical examination report. Terminal dates were reinstated on August 30, 2013, and the subsequent extensions followed.
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> The claimant could have been examined and Dr. Slater's deposition taken at any time during the suspension of terminal dates or during the periods they were extended. No justification for the delay was proffered by counsel. The Court finds respondent's request for further extension would unnecessarily delay proceedings that have already taken too long. The Court would further note the respondent has already entered the deposition of Dr. Toma into the record.[23]
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> Terminal dates for both parties are reset to April 14, 2014.

Pertinent to this appeal, on May 6, 2014, the judge concluded claimant:

- proved personal injury by accident arising out of and in the course of his employment on September 15, 2008;
- provided timely written claim; and
- sustained a 7.5% impairment of function involving his left lower extremity, as based on an equal split between the ratings of Drs. Prostic and Bieri. The judge relied upon Dr. Bieri's initial 5% rating, finding no evidence of preexisting impairment.

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[23] ALJ Order (Apr. 2, 2014).

PRINCIPLES OF LAW AND ANALYSIS

1. Claimant sustained personal injury by accident arising out of and in the course of his employment on September 15, 2008.

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[24] Claimant bears the burden of proving his or her right to an award based on the whole record under a "more probably true than not true" standard.[25]

K.S.A. 2008 Supp. 44-508(d) states that an "accident" is:

> . . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[26]

The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must exist before compensation is allowable and they have separate and distinct meanings:

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[27]

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[24] K.S.A. 2008 Supp. 44-501(a).

[25] *Id.* and K.S.A. 2008 Supp. 44-508(g).

[26] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[27] *Id.*

Claimant sustained personal injury by accident arising out of and in the course of his employment on September 15, 2008. Claimant's testimony alone provides a sound basis for this conclusion.[28] The Board is not persuaded that claimant's denials that he had a prior left knee injury so undermined his credibility for the Board to conclude he was not injured while working for respondent on September 15, 2008. Whether claimant failed to remember his prior left knee injury from 1999 or whether he intentionally withheld such information from Drs. Prostic and Bieri does not cause the Board to doubt that the 2008 injury occurred as alleged.

2. Timely written claim was made.

As noted on page one, respondent concedes written claim was satisfied if the evidence supports such a finding. K.S.A. 44-520a(a) states:

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The purpose for written claim is to enable the employer to know about the injury in time to investigate it.[29] The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.[30] Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. *Fitzwater*[31] describes the test as follows:

> In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

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[28] See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, syl. ¶ 2, 558 P.2d 146 (1976) ("Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive.").

[29] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[30] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[31] *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

In *Ours*,[32] the Kansas Supreme Court held: (1) whether an instrument constitutes a written claim and is timely is primarily a question of fact; (2) a written claim for compensation need not take on any particular form; (3) the written claim need not be signed by claimant; (4) in determining whether or not a written claim was made, a fact finder must examine the various writings and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind; and (5) the fact finder must determine whether claimant had in mind compensation for his injury when the various documents were prepared on his behalf, and did he intend by them to ask his employer to pay compensation?

Written claim is sufficient if it advises the employer that the injured employee is looking to it for compensation.[33] As stated in *Craig*,[34] the purpose for written claim is to enable the employer to know about the injury in time to investigate it.

Written claim must be made within 200 days from the date of accident or within 200 days from the last payment of compensation. The last payment of compensation was when respondent paid for claimant's surgery on July 14, 2009. Written claim was satisfied in a number of ways.

Claimant testified he completed an Incident/Accident Investigation Report Form on September 15, 2008, "[t]o get workmen's comp." A representative of respondent, Mr. Oplotnik, signed a form authorizing medical treatment that very day. Claimant was requesting workers compensation benefits – medical treatment – and respondent complied. Claimant having prepared a document to get benefits the day of his accident is well within 200 days of his accident.

Respondent's March 4, 2009 letter to the Kansas Division of Workers Compensation, in which it stated claimant was "now receiving compensation pay from the company" after his surgery shows the parties had payment of compensation in mind. The letter was drafted 12 days after claimant's surgery, well within the 200 day limit.

Additionally, on multiple occasions in early-to-mid-2009, respondent acknowledged in writing to medical providers that claimant had an ongoing workers compensation claim for which it was responsible to pay for his medical treatment. These letters were all dated within 200 days of claimant's accident.

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[32] *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

[33] *Richardson v. National Refining Co.*, 136 Kan. 724, 18 P.2d 131 (1933).

[34] *Craig*, *supra*.

Claimant's written claim form in Docket No. 1,048,123 for a claim against A&M Engineering was received at the office respondent shares with A&M Engineering on November 4, 2009. Granted, respondent contends A&M Engineering was not claimant's employer.[35] However, the actions respondent took after receipt of the written claim form demonstrates it knew claimant was looking to it for compensation. Respondent's counsel filed an entry of appearance on November 24, 2009, listing respondent in the caption and indicating he represented respondent, not any other entity, such as A&M Engineering. This is within 200 days of July 14, 2009, respondent's last payment of compensation.

The Division's December 14, 2009, and January 6, 2010 documents showing claimant was seeking preliminary benefits were emailed to Mr. Cooper, respondent's health and safety officer, and they list respondent as the party against whom claim was being pursued. Respondent had these documents within 200 days after last paying benefits by way of their July 14, 2009 check for claimant's knee surgery.

In summary, written claim was satisfied many times.

3. The Board affirms the judge's finding regarding the nature and extent of claimant's disability.

K.S.A. 44-510d(a) states in part:

> . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . .
>
> (16) For the loss of a leg, 200 weeks.
>
> . . .
>
> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *Guides*, if the impairment is contained therein.[36]

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[35] The Board does not address this potential issue.

[36] See K.S.A. 44-510e(a).

The trier of fact decides which testimony is more accurate and/or credible and adjusts the medical and lay testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[37]

The Kansas Court of Appeals, in an unpublished opinion, provided guidance regarding the impact of preexisting functional impairment:

> For an award to be reduced by an amount of preexisting functional impairment, the current injury must constitute an aggravation of the preexisting condition. *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 379, 102 P.3d 1169 (2004). Once it is established that the current injury is an aggravation of the preexisting injury, the respondent has the burden of proving the amount of preexisting impairment to be deducted. *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001). This determination must be based upon the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1995). K.S.A. 44-510d(a)(23); *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL 5526549, at 6-7, (Kan. App. Nov. 10, 2011), *rev. denied* (2013), (unpublished opinion).[38]

When assessing preexisting impairment, the Board has considered prior impairment ratings, settlements, preexisting conditions that could have been rated, prior contemporaneous medical records concerning a preexisting condition, claimant's pain level before the recent injury, additional treatment and the nature of claimant's physical activities prior to the recent injury.[39] It is not necessary that a condition was actually previously rated or that prior restrictions were assigned.[40]

In *Baxter v. L. T. Walls Constr. Co.*,[41] the Kansas Supreme Court noted:

> Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury. One hundred percent permanent partial disability is not an

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[37] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[38] *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 107,058, 2012 WL 4937471 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

[39] See generally *Gibson v. Beachner Construction Co., Inc.*, No. 1,040,920, 2010 WL 1445612 (Kan. WCAB Mar. 11, 2010) and *Lyden v. Harrah's Prairie Band Casino*, No. 1,006,198, 2004 WL 2093576 (Kan. WCAB Aug. 30, 2004).

[40] See *May v. Connie May Floor Covering*, No. 1,020,794, 2007 WL 3348527 (Kan. WCAB Oct. 16, 2007).

[41] 241 Kan. 588, 738 P.2d 445 (1987).

> unalterable condition and a worker may be rehabilitated and then return to work. A worker who has once been adjudged 100 percent permanently partially disabled and has received or is receiving benefits, but thereafter returns to work and is again injured while working, is not precluded from receiving benefits for the loss of wages resulting from the subsequent injury's aggravation of his disability. A disabled worker may receive disability benefits more than once, but the worker may not pyramid benefits and receive in excess of the maximum weekly benefits provided by statute.[42]

When a worker with a preexisting condition sustains a subsequent work-related injury that aggravates, accelerates, or intensifies his or her condition, resulting in disability, he or she is entitled to be fully compensated for the resulting disability.[43] The test for compensability is not whether the injury causes the condition, but whether the injury aggravates or accelerates the condition.[44]

Respondent argues claimant failed to prove permanent impairment because he denied his prior knee injury and the doctors who provided ratings did not have an accurate history upon which to provide expert opinions. The Board disagrees. Claimant, despite providing doctors with an inaccurate history about his prior knee injury, proved he sustained permanent impairment above and beyond any preexisting impairment. Both Drs. Prostic and Bieri, when given knowledge of the prior injury and prior rating, nonetheless assigned claimant impairment based solely on the 2008 accidental injury.

The Board agrees with the judge's conclusion that a deduction for preexisting impairment was not warranted. Respondent has the burden to prove preexisting impairment.[45] Respondent proved claimant had a 5% left lower leg rating in 1999, but such fact does not necessarily mean he still had such impairment in 2008. Claimant testified he had no treatment for his knee after being released by Dr. Toma in 1999 until his 2008 injury. He denied taking pain medication for his knee in the interim. He contended he made a full recovery and had no intervening knee problems. Respondent did not refute such testimony. Claimant was able to work as a heavy equipment operator between 1999 and September 2008. These factors lean toward the absence of a loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *Guides*. Quite simply, the record does not establish that claimant was symptomatic or impaired for many years prior to the 2008 accidental injury.

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[42] *Id.* at 593; see also *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 & 83,349, 4 P.3d 1188 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

[43] *Baxter v. L.T. Walls Constr. Co.*, 241 Kan. 588, 591, 738 P.2d 445 (1987).

[44] *Claphan v. Great Bend Manor*, 5 Kan.App.2d 47, 49, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

[45] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Moreover, claimant's 2008 left knee injury was different than his 1999 injury and resulted in a permanent worsening. Claimant only needed knee surgery in 2008, not 1999. Claimant had different physical findings after his 2008 accidental injury as compared to the prior knee injury. The medical evidence establishes claimant's impairment from the 2000 accidental injury is new and separate from his impairment from the 1999 injury. Dr. Bieri indicated claimant had new impairment that was independent and separate from his preexisting impairment. Dr. Prostic testified his rating for the 2008 injury was based on physical findings not noted by Dr. Toma in 1999. The Board adopts such testimony as conclusive. Respondent is not entitled to a deduction in claimant's impairment of function for the 2008 accidental injury because of the 1999 injury.

4. The Board will not disturb the judge's ruling regarding terminal dates.

Respondent contends the judge erred in not extending its terminal date in order to put on medical evidence.

K.S.A. 2008 Supp. 44-523 states in part:

> (a) The director, administrative law judge or board shall not be bound by the technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.
>
> (b) Whenever a party files an application for hearing . . . the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be granted if all parties agree. An extension of the foregoing time limits may also be granted:
>
> (1) If the employee is being paid temporary or permanent total disability compensation;
>
> (2) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
>
> (3) on application for good cause shown.

The Kansas Court of Appeals has addressed this issue:

> Terminal dates as defined by and set under K.S.A. 44-523(b) can be extended by agreement of the parties or by reason of specific statutory exceptions, which include "for good cause shown." The granting of an extension of the terminal dates for good cause shown carries a discretionary review similar to the granting or denying of a motion for a continuance. Such a ruling is discretionary and will not be disturbed on appeal unless there is a clear showing of an abuse of discretion.[46]

Similarly, the Board likens terminal dates to discovery deadlines in a civil case. "Control of discovery is entrusted to the sound discretion of the district court, and orders concerning discovery will not be disturbed on appeal in the absence of clear abuse of discretion. [Citations omitted.]"[47]

Appellate cases conclude a judge's ruling regarding terminal dates should be reviewed based on an abuse of discretion standard. The judge did not abuse his discretion. The Board cannot say no reasonable hearing officer would have taken the same position as did the judge regarding his rejection of respondent's request for an extension of terminal dates.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board concludes:

- claimant proved personal injury arising out of and in the course of his employment on September 15, 2008;
- claimant proved timely written claim;
- claimant sustained a 7.5% impairment to his left lower extremity;
- respondent did not prove a credit for preexisting impairment; and
- the judge's management of terminal dates was proper.

AWARD

WHEREFORE, the Board affirms the May 6, 2014 Award.

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[46] *Tull v. Atchison Leather Products, Inc.,* 37 Kan. App. 2d 87, 99, 150 P.3d 316 (2007); see also *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 97, 998 P.2d 514 (2000) and *Goss v. Century Mfg., Inc.*, No. 108,367, 2013 WL 3867840 (Kansas Court of Appeals unpublished opinion filed July 26, 2013).

[47] *Kansas Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 618, 244 P.3d 642 (2010).

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Brad E. Avery